

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CRAIG CUNNINGHAM,

Plaintiff,

v.

MICHAEL MONTES, TOLLFREEZONE.COM, INC.,
MYDATAGUYS.COM, LLC,
PODMUSICGEAR.COM, INC.,
EMAILMYVMAIL.COM, INC., and
JOHN/JANE DOE 1-10,

Defendants.

OPINION & ORDER

16-cv-761-jdp

Plaintiff Craig Cunningham filed suit against defendant Michael Montes and his businesses, alleging that defendants called Cunningham's cell phone using an autodialer, in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b) and (c). Dkt. 1. Cunningham attempted to serve Montes with the summons and complaint, but has been unable to do so. He asks the court for leave to serve Montes (and his businesses) by publication. Dkt. 3.

Federal Rule of Civil Procedure 4(e)(1) permits service pursuant to the law of the state in which the district court sits—here, Wisconsin. Wis. Stat. § 801.11(1)(c) permits service by publication after a plaintiff exercises reasonable diligence to serve a defendant, either personally or by leaving the summons and complaint at the defendant's home with an adult resident or a family member at least 14 years old.

Cunningham's motion indicates that he enlisted the help of the St. Croix County Sheriff's Office to serve Montes. A deputy sheriff attempted to serve Montes at a house in St. Croix County, which county records indicate Montes owns. According to the deputy sheriff's

certificate, he could not locate Montes at that address, but left his business card there and later called the phone number associated with the address. Montes told the deputy sheriff over the phone that he does not live at that address and would not disclose his current address. He said that Cunningham would have to “hunt him down.” Dkt. 3-3, at 4.

The court concludes that Cunningham has exercised reasonable diligence to serve Montes, and so it will grant Cunningham’s motion for service by publication. Cunningham must follow the publication procedures required by the Wisconsin statutes, including mailing a copy of the summons and complaint to Montes’s post office box. Because Cunningham has good cause for failing to serve Montes within 90 days of filing his complaint, the court will extend the time for service under Rule 4(m) to allow Cunningham time to accomplish service. Cunningham must file proof of service by publication with this court within 45 days of the day of this order.

Cunningham also asks the court to issue subpoenas to Verizon Wireless so that he may obtain cell site location data for Montes. But because the court will allow Cunningham to serve Montes by publication, he does not need to ascertain Montes’s physical location. So the court will deny Cunningham’s motion for subpoenas as unnecessary.

ORDER

IT IS ORDERED that:

1. Plaintiff Craig Cunningham’s motion for leave to conduct service via publication, Dkt. 3, is GRANTED.
2. Plaintiff’s request for the clerk to issue 10 subpoenas, Dkt. 3, is DENIED.

3. Cunningham must file proof of service with the court within 45 days of the date of this order.

Entered February 27, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge